IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 1205 of 2006
In
SPECIAL CIVIL APPLICATION No. 2113 of 2003
With
CIVIL APPLICATION No. 11144 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA Sd/-

HONOURABLE MR.JUSTICE K.A.PUJ Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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DILIPBHAI MANEKLAL VYAS - Appellant
Versus
TORRENT POWER A.E.C. CO. - Respondent

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Appearance :
MR VIMAL M PATEL for Appellant.
MR K B TRIVEDI, SENIOR ADVOCATE FOR M/S TRIVEDI & GUPTA for Respondent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 18/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. By way of this appeal filed under Clause 15 of the Letters Patent, the appellant – original petitioner has challenged the order dated 13.01.2006 passed by the Learned Single Judge in Special Civil Application No. 2113 of 2003 dismissing the said petition filed by the present appellant against the order dated 14.02.2003 passed by the Industrial Court in Revision Application No. 64 of 2001 setting aside the order dated 25.05.2001 passed by the Industrial Court in Appeal (IC) No. 01/1998 confirming the award application dated 28.11.1997 passed by the

Labour Court in T. Application No. 248/1992 directing the respondent to pay back wages to the appellant for the period from 13.04.1992 to 16.02.1994 and not interfering with the termination order of the appellant in view of the fact that the appellant was reinstated in service.

2. The brief facts giving rise to the present appeal are that the appellant was appointed vide an order dated 26.11.1990 as temporary Security Inspector with effect from 01.12.1990 till the completion of the work or 31.05.1991, whichever was earlier. The appellant was appointed after calling for personal interview and other procedure including medical examination. The said period was extended upto 31.12.1991 or till the completion of the work whichever was earlier, vide order dated 28.05.1991. Thereafter vide order dated 27.12.1991, the appellant was appointed as Security Inspector on probation for a period of six months with effect from 01.01.1992. The appellant was appointed on a permanent post and the services were time and

again extended by the respondent.

3. The respondent vide letter dated 13.04.1992 terminated the service of the appellant with immediate effect as per Clause 3 of the appointment order dated 27.12.1991. Being aggrieved by the said action of the respondent, the appellant filed T. Application No. 248 of 1992 in the month of June 1992 under the provisions of the Bombay Industrial Relationship Act, 1946 ('the Act' for short). Despite notice/summons being served on the respondent, nobody appeared on behalf of the respondent before the Labour Court to defend its case. Finally the Labour Court vide award dated 26.11.1992, had directed the respondent to reinstate the appellant with full back wages. Against the said award, being an ex-parte award, the respondent preferred Misc. Application No. 223 of 1993 for restoration of the T-Application No. 248 of 1992. In the said proceedings of Misc. Application No. 223 of 1993, the respondent submitted a purshis dated 16.03.1994 whereby it was agreed that subject to the rights and

contentions, the appellant be reinstated on duty.

4. Considering the said purshis, the Labour Court vide order dated 16.03.1994 set aside the order dated 26.11.1992 and restored T-Application No. 248 of 1992. Thereafter, vide order dated 18.03.1994, the respondent had reinstated the appellant clarifying that the issue of back wages for the period from 13.04.1992 to the date of order of reinstatement in service would be decided as per the judgment of the Labour Court in T-Application No. 248 of 1992. Pursuant to the said order, the service of the appellant was continued and in view of condition No.2 of the said order, the order of reinstatement was considered to be regular in nature. Thus, according to the appellant, the issue of back wages was only kept for decision of the Labour Court.

5. During the pendency of the said proceedings before the Labour Court, the appellant applied in the post of Security In-charge pursuant to a notice dated 09.05.1997 published by the respondent inviting

applications for the said post. The appellant was called for written test and oral interview by the respondent vide letter dated 13.06.1997. The appellant appeared for the written test and was orally interviewed by the respondent. The appellant was then selected and was appointed on probation vide letter dated 07.07.1997 in the post of Security In-charge and was ultimately confirmed vide order dated 29.12.1997 by the respondent, with effect from 01.01.1998 on the same terms and conditions as stated in the letter dated 07.07.1997. It was the case of the appellant that the appellant was confirmed in view of satisfactory work found by the respondent during the probationary period.

6. On 28.11.1997, the Labour Curt has passed an award directing the respondent to pay back wages to the appellant for the period from 13.04.1992 to 16.02.1994 and did not interfere with the order of termination in view of the fact that the appellant was reinstated in service. Being aggrieved by the said award, the respondent preferred appeal under

Section 84 of the Act. An application for ad-interim stay was granted by the Industrial Court vide order dated 21.01.1998 whereby the operation and implementation of the award dated 28.11.1997 was stayed pending hearing of the appeal. Despite the award being stayed, the service of the appellant was never terminated since the appellant was selected in the post of Security In-charge. However, the back wages were not paid to the appellant in view of the stay order. The Industrial Court, vide order dated 25.05.2001 had dismissed the appeal filed by the respondent.

7. The respondent thereafter preferred Revision Application No. 64 of 2001 inter alia praying for review of the order dated 25.05.2001 passed by the Industrial Court along with an application for stay. According to the appellant, in the said Revision Application, the respondent did not disclose the fact that the appellant was selected and confirmed in the post of Security In-charge. On the stay application, the Industrial Court vide order dated 20.07.2001

stayed its own order dated 25.05.2001. In view of the said stay order, the respondent did not pay back wages and did not terminate the service of the appellant since the appellant was selected in the post of Security In-charge. In the said revision application, the concerned advocate representing the appellant did not remain present at the time of hearing. Even the appellant was not aware about the date of hearing because of which the case of the appellant was not represented and it was not argued out before the Industrial Court. After hearing the advocate for the respondent Company, the Industrial Court, vide order dated 14.02.2003, allowed the revision application and set aside the award dated 28.11.1997 passed by the Labour Court and reviewed the order dated 25.05.2001 passed by the Industrial Court and declared that the appellant was not entitled to any relief.

8. Pursuant to the order dated 14.02.2003 passed by the Industrial Court, the appellant was discontinued from service by the respondent vide letter dated

27.02.2003. Being aggrieved by the said order dated 14.2.2003, the appellant filed Special Civil Application No. 2113 of 2003 before this Court. Simultaneously, another Special Civil Application No.2819 of 2003 was filed by the appellant challenging the letter dated 27.02.2003 whereby the appellant was dismissed from service. The said petition was dismissed by the Learned Single Judge of this Court vide order dated 23.06.2004 on the ground that the said petition was duplication of petition being Special Civil Application No.2113 of 2003. Thereafter, Special Civil Application No.2113 of 2003 was heard and the Learned Single Judge of this Court has dismissed the said petition vide order dated 13.01.2006.

9. It is this order which is under challenge in the present Letters Patent Appeal.

10. Notice was issued by this Court on 12.02.2006 and on the joint request of the parties, the appeal was taken up for final hearing.

11. Before Mr. Vimal Patel, learned advocate appearing for the appellant makes his submission, Mr. K. B. Trivedi, learned Senior Counsel appearing for the respondent has raised a preliminary objection against the maintainability of the Letters Patent Appeal filed by the appellant. The preliminary objection was to the effect that the Learned Single Judge, while deciding the petition, has exercised supervisory jurisdiction vested under Article 227 of the Constitution of India. The Learned Single Judge, while delivering the decision under challenge, has exercised power of superintendence under Article 227 of the Constitution of India. Therefore, in light of Clause 15 of the Letters Patent, the Letters Patent Appeal is not maintainable. According to Mr. Trivedi, the appellant in the said petition, challenged the order dated 14.02.2003 passed by the Industrial Court (Gujarat), Ahmedabad in Review Application No.64 of 2001. The prayers made in the petition also invoked supervisory jurisdiction of this Court under Article 227 of the Constitution of India in as much as

the appellant – orig. petitioner did not pray for issuance of a writ of certiorari. He has, therefore, submitted that the petition has not been filed invoking jurisdiction of the High Court under Article 226 of the Constitution of India. In support of his submissions, he relied on the following decisions :-

(1) **Umaji Keshao Meshram and others Vs. Smt. Radhikabai and another, AIR 1986 S.C. 1272** (2) **Kanaiyalal Agrawal and others V/s. Factory Manager, Gwalior Sugar Company Limited, (2001) 9 SCC 609** (3) **Ishwarbhai Narottambhai Patel V/s. K. H. Trivedi & Ors. 2003 (3) GLR 1878** (4) **Steel Authority of India Limited V/s. Gujarat Mazdoor Panchayat and Another 2004 (1) GLR 729**. (5) **Life Insurance Corporation of India V/s. Pravinbhai Trivedi, (2006) 11 GHJ 161**.

12. Based on the aforesaid judgments, Mr. Trivedi has strongly urged that the present appeal deserves to

be dismissed only on the ground of maintainability since appeal filed against the order or judgment passed in a petition whereby the Learned Single Judge has exercised his jurisdiction under Article 227 of the Constitution of India, is not maintainable.

13. While meeting with this preliminary objection, Mr. Vimal Patel, learned advocate appearing for the appellant has submitted that the appellant has filed petition under Article 226 & 227 of the Constitution of India. The preamble of the petition clearly indicates that while filing the petition, the appellant has invoked the jurisdiction of this Court under the provisions of Article 226 read with Articles 14, 16 & 19 (1) (g) of the Constitution of India. He has further submitted that the Learned Single Judge has also exercised the powers under Article 226 of the Constitution of India and nowhere it is stated that he was exercising the said powers under Article 227 of the Constitution of India. He has, therefore, submitted that the present appeal should be entertained on merits without being thrown out on

the ground of non-maintainability. In support of his submission, he relies on the latest decision of the Hon'ble Supreme Court in the case of Kishorilal V/s. Sales Tax Officer, District Land Development Bank and others, (2006) 7 SCC 496 wherein it is held that the Division Bench of the High Court wrongly dismissed the Letters Patent Appeal without noticing that an appeal would be maintainable if the writ petition was filed under Article 226 & 227 of the Constitution of India as was held by this Court i.e. Supreme Court in **Sushilabai Laxminarayan Mudliyar Vs. Nihalchand Waghjibhai Shah, (1993) Supp. 1 SCC 11**.

14. So far as merits of the matter is concerned, Mr. Patel has submitted that the impugned order passed by the Learned Single Judge is absolutely illegal, unjust, arbitrary, contrary to material on record and against the settled propositions of law and inequitable. The order dated 14.02.2003 was passed by the Industrial Court without hearing the appellant

and the revision application was heard in absence of the advocate representing the case of the appellant. The said order passed by the Industrial Court is in breach of the principles of natural justice. He has further submitted that the Industrial Court had not committed any error warranting case for review of its own order and hence, while entertaining the revision application, the Industrial Court has committed serious error of law. Even the Learned Single Judge while dismissing the petition has not considered the facts in their proper perspective as the respondent had not come with clean hands and had not disclosed the material facts in the revision application.

15. He has further submitted that regarding selection and confirmation of the appellant in the post of Security In-charge subsequent to the order of termination which it could have been brought to the notice of the Industrial Court, the order dated 14.2.2003 would not have been passed by the Industrial Court. He has further submitted that

neither the Industrial Court nor the Learned Single Judge has considered that the appellant came to be selected as Security In-charge after succeeding in the written test and oral interview and performed satisfactory work during the probationary period. The appellant was, therefore, selected and confirmed in the post of Security In-charge and was in service subsequent to the termination order passed by the respondent. He has, therefore, submitted that it was not necessary either for the Industrial Court or for the Labour Court to go into the issue of validity of termination order except the issue of back wages for the period from 13.04.1992 to 18.03.1994. The Learned Single Judge has overlooked the fact that the appellant was given extension of time on temporary basis that he was working on a permanent post of Security In-charge only with a malafide motive to terminate the appellant from service. The Learned Single Judge has overlooked the fact that vide order dated 18.03.1994, the appellant was reinstated in service with the clarification that only the issue of payment of wages

and other benefits would be subject to the outcome of the judgment of the Labour Court in T-Application No. 248/1992. The parties to the proceedings also understood it in the same manner and it was only because of the reinstatement of the appellant, Misc. Application for restoration was allowed by the Labour Court and only determination of the back wages was left open to be decided between the parties. Before terminating the services of the appellant, the respondent did not issue any notice or conduct any inquiry though the appellant had completed 240 days. The termination order was, therefore, in violation of Section 25 (f) of the Industrial Disputes Act, 1947. He has further submitted that the appellant was selected and confirmed in the post of Security In-charge in respect of which reference was never pending and considering the length of service of the appellant, his age, non-availability of job elsewhere due to age bar, the case of the appellant ought to have been considered sympathetically, more so when the appellant was an Ex-service person having worked

for a period of about 15 years in the Indian Air Force as Sargent putting up meritorious service record with achievement in the form of two President Awards as Raksha Medal and Jammu Kashmir Medal. The respondent, under the guise of the order passed by the Industrial Court, has terminated the service of the appellant in the post of Security In-charge despite the fact that the T-Application was in respect of the termination of the appellant in the post of Security In-charge. He has, therefore, submitted that the action of the respondent in terminating the service of the appellant is malafide, unjust and amounts to abuse of process of the Court.

16. Mr. Patel has further submitted that there is no question of challenging the order of the Labour Court as the Labour Court has observed that the question of reinstatement does not arise. There is no declaration regarding setting aside the order of retrenchment which was passed and subsequent to which the appellant was restored in service. It is totally a misnomer to say that the appellant having

accepted the order of the Labour Court qua back wages, it is not possible to accept the contention that the appellant has been reinstated in service since there is no declaration of the Competent Court regarding setting aside the original order of retrenchment of the appellant from service. Even if it is so, the termination order would stand only up to the date when the appellant was selected and confirmed in the post of Security In-charge which was different to the post of Security Inspector and, therefore, the issue that would survive would only be regarding back wages from the date of termination till the date of reinstatement. Mr. Patel has further submitted that despite the provisions for review under the provisions of the Act, the principles of review laid down under Order 41, Rule 1 of Code of Civil Procedure would equally apply to the Industrial Court while exercising powers of review under the said Act. Even if it is assumed that the law on the subject regarding probationary is settled and that no inquiry is necessary for relieving a person who is on probation, the fact still remains that subsequent to

the termination, the appellant was again selected and confirmed in the post of Security In-charge after considering the application, written test, oral interview and performance of satisfactory work during probationary period. Even otherwise, before terminating the service, the respondent was required to give notice, one month pay and to conduct an inquiry in view of the fact that the appellant had completed 240 days in a preceding year from the date of termination.

17. Based on the aforesaid submissions, Mr. Patel has strongly urged that the impugned order passed by the Learned Single Judge while exercising his powers under Article 226 of the Constitution of India deserves to be quashed and set aside and that the order of the Industrial Court initially passed dismissing the appeal filed against the award of the Labour Court ought to have been restored.

18. Mr. K. B. Trivedi, learned Senior Counsel appearing for the respondent, on the other hand and without

prejudice to the preliminary contention with respect to maintainability of the appeal, has submitted on merits that the appellant has filed the petition essentially against the order of the Industrial Court. The Learned Single Judge of this Court vide order dated 23.06.2004 while dismissing the petition being Special Civil Application No.2819 of 2003 filed by the appellant observed that the appellant would be at liberty to challenge the order/communication dated 27.02.2003 before the Labour Court. He has, therefore, submitted that the challenge to the order/communication dated 27.02.2003 is a separate cause of action for which the appellant possesses statutory remedy and hence, the petition suffered from misjoinder of causes of action. Such a cause of action requires to be adjudicated upon by the Labour Court by leading oral as well as documentary evidence and not by this Court in exercise of its supervisory jurisdiction. If a statute confers a right and in the same breath provides for a remedy for enforcement of such right, it is a right as well as duty of the appellant to first avail such remedy.

A principle is laid down by the Hon'ble Supreme Court that bypassing of statutory remedy is not permitted and a writ petition should not be entertained when the statutory remedy is available. He has, therefore, submitted that the Learned Single Judge has rightly relegated the appellant to avail the remedy by order dated 23.06.2004. In support of this submission, he relied on the following decisions:-

(1)**A.P. Foods V/s. S. Samuel and others, (2006) 5 SCC 469** (2) **Andhra Pradesh State Road Transport Corporation and Others V/s. G. Srinivas Reddy and others (2006) 3 SCC 674** (3) **Chandrakant Tukaram Nikam V/s. Municipal Corporation of Ahmedabad and another (2002) 2 SCC 542** (4) **The Premier Automobiles Ltd., V/s. Kamlekar Shantiram Wadke of Bombay and others (1976) 1 SCC 496** (5) **Basant Kumar Sarkar and others V/s. Eagle Rolling Mills AIR 1964 S.C. 1260.**

19.Mr. Trivedi has further submitted that the powers of

review conferred upon the Industrial Court under Section 95 of the Act are expressed in wide language so as to enable the Industrial Court to review its order for any sufficient reason. The appellant, while invoking jurisdiction of this Court under Article 227 of the Constitution of India, has failed to establish before the Learned Single Judge that the order dated 14.02.2003 passed by the Industrial Court is without jurisdiction or is beyond jurisdiction conferred upon the Industrial Court. This Court, in exercise of its supervisory jurisdiction is not called upon to examine the findings of fact arrived at by the Court. The decisions relied upon by the appellant before the Learned Single Judge pertain to the powers of review of a Civil Court under the provisions of Code of Civil Procedure. However, even otherwise clause “sufficient reason” fell for consideration of the Hon'ble Supreme Court whereby the Hon'ble Supreme Court has interpreted that the words “sufficient reason” are wide enough to include a misconception of fact or law by a Court or even an advocate. The review jurisdiction of the Industrial

Court being wider than the powers of the Civil Court under Order 47, decisions relied on behalf of the appellant are not applicable to the present case. For this purpose, he relied on the decision of the Hon'ble Supreme Court in the case of BCCI and another V/s. Netaji Cricket Club and others, (2005) 4 SCC 741.

20. Mr. Trivedi has further submitted that the Labour Court vide its order dated 28.11.1997 granted back wages for the period from 13.04.1992 to 16.02.1994 without granting reinstatement. The Industrial Court also in Appeal No. 1/98 confirmed the order of the Labour Court. He has, therefore, submitted that the appellant has been granted monetary relief whereas the relief of reinstatement has not been granted. The appellant did not have a declaration in his favour from any Court which entitles him to continue in service.

21. Mr. Trivedi has further submitted that the appellant has been terminated while serving as a probationer and being a probationer, the appellant does not

acquire any right. According to him, it is a settled legal principle that before termination of services of probationer for unsatisfactory work, no inquiry is necessitated. He has, therefore, submitted that discharge of the appellant from services during probationary period is just, legal and valid and it is not obligatory on the part of the respondent to hold inquiry before discharging the appellant. For this purpose, he relied on the following decisions :-

(1)**State of West Bengal V/s. Tapas Roy (2006) 6 SCC 453** (2) **Rajasthan State Road Transport Corporation V/s. Zakir Hussain (2005) 7 SCC 447** (3) **Municipal Committee, Sirsa V/s.Munshiram (2005) 2 SCC 382** (4) **Pavanendra Narayan Verma V/s. Sanjay Gandhi PGI of Medical Sciences & Anr. AIR 2002 S.C. 23** (5) **Shailaja Shivajirao V/s. President, Hon'ble Khasdar UGS Sanstha & Ors.,(2002) 10 SCC 394** (6) **Ramkishan Bairwa V/s. Bundi Chittodgarh Kshetriya Gramin Bank & Anr.**

1993 (1) LLJ 986 (7) **Unit Trust of India and others V/s. T.Bijaya Kumar Anr. 1993 (1) LLJ 240**.

22. Based on the aforesaid submissions and the decisions cited at bar, Mr. Trivedi has strongly urged that even on merits also, the appellant does not have any case which calls for any interference by this Court while exercising its appellate powers under Clause 15 of the Letters Patent and, therefore, the appeal deserves to be dismissed.

23. After having heard learned counsels appearing for the respective parties at length on both the questions, namely, maintainability of Letters Patent Appeal as well as on merits of the matter, and after having considered the authorities cited in this behalf and also after having minutely perused the impugned judgment of the learned Single Judge as well as the orders of the Court / Tribunal below, we are of the view that the present Appeal filed under

Clause-15 of Letters Patent against the impugned judgment and order of the learned Single Judge is not maintainable, as in our opinion the learned Single Judge exercised the writ jurisdiction under Article-227 of the Constitution of India. Apart from the fact that the Appeal is liable to be dismissed on the ground of non-maintainability, even on merits, our interference is not warranted while exercising our appellate jurisdiction under Clause-15 of the Letters Patent.

24. As far as maintainability of the Appeal under Clause-15 of the Letters Patent is concerned, Mr.Vimal Patel, learned advocate appearing for the appellant has strongly relied on recent decision of **Kishorilal Vs. Sales Officer, District Land Development Bank and others, (2006)7 Supreme Court Cases 496**. If we peruse the said judgment, it is clear that the Hon'ble Supreme Court has come to the conclusion that the writ petition was filed under Articles-226 and 227 of the Constitution

of India. Once the Court comes to the conclusion that the petition is filed under Articles-226 and 227 of the Constitution of India, an Appeal is certainly maintainable under Clause-15 of the Letters Patent. In the case before the Hon'ble Supreme Court, contentions were raised on behalf of the appellant, which found favour with the Board of Revenue, are that;

(a) No notice of auction was served upon him.

(b) The statutory requirements of Section 18(2)(b) of the Land Development Bank Act and Rule 15(d) of the rules framed thereunder, known as the M.P.Sahakari Bhoomi Vikas Bank Rules, 1967 were not complied with.

(c) The service of the proclamation report was not certified by the person who effected the service.

(d) He was a minor.

Despite these facts, the High Court has reversed the findings of the Board of Revenue and held that the irregularities in the auction cannot be a ground for impeaching the title of the purchaser in terms of Section-27 of the 1966 Act and that non-service of

notice was a procedural irregularity. A letters patent appeal filed by the appellant before the Division Bench was dismissed holding that the same was not maintainable on the premise that the learned Single Judge has exercised jurisdiction under Article-227 of the Constitution of India. Based on these facts, the Hon'ble Supreme Court in para-13 of the judgment has observed that the learned Single Judge of the High Court committed an error in interfering with the findings of fact arrived at by the Board of Revenue. The Division Bench of the High Court also wrongly dismissed the Letters Patent Appeal without noticing that an appeal would be maintainable if the writ petition was filed under Articles-226 and 227 of the Constitution of India as was held by this Court in Sushilabai Laxminarayan Mudliyar Vs. Nihalchand Waghajibhai Shaha.

25. We are of the view that the above decision would not render any assistance to the case of the appellant. Here in the present case the learned Single Judge has exercised his jurisdiction under

Article-227 of the Constitution of India. After appreciating the facts and evidence on record the learned Single Judge has come to the conclusion that the petitioner / present appellant ought to have challenged the order of the Labour Court though the Labour Court has observed that the question of reinstatement does not arise. The learned Single Judge was of the opinion that there was no declaration regarding the setting aside order of retrenchment, which was passed and subsequent to which the petitioner – appellant was restored in service. The learned Single Judge has further observed that the petitioner – appellant having accepted the order of Labour Court qua backwages, it is not possible to accept the contention of the appellant that the appellant has been reinstated in service. There is no declaration from the competent Court regarding setting aside the original order of retrenchment of the appellant from the service and the order of the Labour Court was not challenged by the appellant either by way of filing cross-objection or appeal before the Industrial Tribunal. The

learned Single Judge has also taken into consideration that the order appealed was passed by the Industrial Tribunal in the Review Petition and considering Regulation, 95 the learned Single Judge has observed that the order impugned passed by the Tribunal is just and proper, more particularly when law on the subject regarding probation is settled that no inquiry is necessary for relieving a person who is on probation. We are, therefore, of the view that the challenge under caption petition is against the decision of the Tribunal and the Court subordinate to this Court. The prayers made in the petition clearly invoke supervisory jurisdiction of the learned Single Judge of this Court under Article-227 of the Constitution of India and no prayer for issuance of a writ of certiorari was made in the petition. Hence, it is difficult for us to arrive at the conclusion that the appellant has filed the petition before the learned Single Judge of this Court invoking the jurisdiction of the Court under Article-226 of the Constitution of India. Even if, in the preamble, it is stated that the petition is filed under Article-226 and even if the

learned Single Judge has not made clear anywhere in his judgment as to whether he has decided petition under Article-226 and/or under Article-227 of the Constitution, the tenor of the judgment, prayers made in the petition and facts and circumstances of the case clearly reveal that the learned Single Judge has decided the petition under Article-227 of the Constitution of India.

26. So far as the decisions relied on by Mr.Trivedi, learned Senior Counsel for the respondent are concerned, in Umaji Keshao Meshram and others (Supra), the Hon'ble Supreme Court has held that a proceeding under Article-226 is an original proceeding and when it concerns civil rights, it is an original civil proceeding. Consequently where a petition filed under Article-226 of the Constitution is according to the rules of a particular High Court heard by a single Judge, an intra-court appeal will be from that judgment if such a right of appeal is provided in the charter of that High Court, whether such Charter be Letters Patent or a statute. It is

further observed that a proceeding in Article-227 of the Constitution of India is not an original proceeding. An intra-court appeal does not lie against the judgment of a single Judge of the Bombay High Court given in a petition under Article-227 by reason of such appeal being expressly barred by Clause-15 of the Letters Patent. It is further observed by the Hon'ble Supreme Court that where the facts justify a party in filing an application either under Article-226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article-226 and if in deciding the matter, in the final order, the Court gives ancillary directions which may pertain to Article-226, this ought not to be held to deprive a party of the right of appeal under Clause-15 of the Letters Patent where the substantial part of the order sought to be appealed is against Article-226.

27. In the Full Bench decision of this Court in the case of **Dilavarsinh Khodubha Vs. State of Gujarat & Ors., reported in GLR 1995(1) 36 p.110** this Court has held that the Letters Patent Appeal under Clause-15 would lie against the order made by the learned Single Judge in such petitions challenging the order of the Urban Land Tribunal passed under Sec.33 of the Act. The earlier decision of this Court, to the extent it is held that the petitions, filed under Art.226, or both under Arts.226 and 227 against an order of the Urban Land Tribunal, were to be treated, in substance and in essence, as petitions under Art.227 and, therefore, no Letters Patent Appeal lies against the orders made by a Single Judge in such petitions, are, in conflict with the decisions of the Supreme Court in Umaji's case (AIR 1986 SC 1272), Sushilabai's case (AIR 1992 SC 185) and Mangalbhai's case (AIR 1993 SC 806) and for reasons aforesaid no longer good law to the extent of the above conflict. The Court further held that a petition under Art.226 for a writ of a Certiorari or a

writ in the nature of Certiorari would like against an order of the Urban Land Tribunal passed under Sec.33 of the Urban Land (Ceiling & Regulation) Act, 1976, and orders made in such petitions by the Single Judge are subject to appeal under Clause-15 of the Letters Patent.

28. In the case of **Kanhaiyalal Agrawal and others Vs. Factory Manager, Gwalior Sugar Company Ltd., reported in (2001) 9 Supreme Court Cases 609**, the Hon'ble Supreme Court has held that so far as the law on the matter is concerned, as to whether an appeal would lie against an order made in writ petition before the High Court challenging an order of the Labour Court, this Court in its decision in Lokmat Newspapers (P) Ltd Vs. Shankarprasad stated that if a Single Judge exercises jurisdiction under Ar.226, letters patent appeal would be maintainable, but if the jurisdiction is exercised under Art.227 it will not be maintainable. But with an explanation that if the Single Judge of the High

Court in considering the petition under Art.226 or Art.227 does not state under which provision he has decided the matter and where the facts justify filing of petition both under Art.226 and Art.227 and a petition so filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an appeal. The Hon'ble Supreme Court held as aforesaid in view of its earlier decisions in Umaji Keshav Meshram Vs. Radhikabai, Ratnagiri Distt. Central Coop.Bank Ltd. Vs. Dinkar Kashinath Watve and Sushilabai Laxminarayan Mudliyar Vs. Nihalchand Waghajibhai Shaha.

29. The Division Bench of this Court in the case of **Ishwarbhai Narottambhai Patel (Supra),** after discussing the entire case law on the subject and even after considering the insertion of Section-100A in the Code of Civil Procedure, 1908 and the effect thereof on the maintainability of intra-court appeal, has carved out the following principles, which are required to be applied while considering the

question about maintainability of Letters Patent Appeal against the judgment of the single Judge in a Petition under Articles-226 and/or 227 of the Constitution of India.

(i) Whether the petitioner has invoked jurisdiction of this Court under Article 226 or Article 227, if the learned Single Judge has exercised jurisdiction under Article 226, Letters Patent Appeal would be maintainable.

(ii) If the judgment rendered by the learned Single Judge is in exercise of jurisdiction under Article 227 of the Constitution, Letters Patent Appeal would not be maintainable.

(iii) If the Single Judge has not stated whether he has exercised his jurisdiction under Article 226 or 227 of the Constitution, it would be relevant to examine whether the proceeding in question is an original proceeding or the proceeding challenges the decision of a Tribunal. If the proceeding is original, the petition would obviously be under Article 226.

If the petition challenges the decision of a Tribunal, further inquiry should ensue. The expression "Tribunal" would include within its ambit adjudicating bodies, provided they are constituted by the State and are invested with judicial, as distinguished from purely administrative or executive functions. The principal test of determining the character of the authority as Tribunal is whether that authority is empowered to exercise any adjudicating power of the State and whether the same has been conferred on it by any statute or a statutory rule.

If the Tribunal or the Court has exercised judicial function of the State as explained in the decision of the Apex Court in State of Maharashtra vs. Labour Law Practitioners' Association, AIR 1998 SC 1233 and the Tribunal or the Court is subordinate to the High Court within the meaning of Article 235 of the Constitution, then a presumption will be raised that the Single Judge has exercised his jurisdiction under Article 227 of the Constitution.

(iv) If the Single Judge has not stated under which provision he has decided the matter and where the facts justify filing of petition both under Article 226 and Article 227 and the Court has decided the petition on merits, the Letters Patent Bench would consider whether substantial part of the order sought to be appealed against is under Article 226 or not. If it is found that the substantial part of the order sought to be appealed against is under Article 226, Letters Patent Appeal would be maintainable, but not otherwise.

(v) If substantial part of the order sought to be appealed against is under Article 226, Letters Patent Appeal would not become non-maintainable merely because in the final order the Single Judge has given ancillary directions which may pertain to Article 227.

30. Considering the aforesaid principles and in view of the conclusion drawn by us in the aforesaid paragraphs, we are of the view that while considering the submissions made on behalf of the

petitioner / appellant learned single Judge has exercised his power under Article-227 of the Constitution of India and hence the present appeal filed against the order and judgment of the learned Single Judge is not maintainable.

31. In the case of **Steel Authority of India Ltd Vs. Gujarat Mazdoor Panchayat & Anr.**, wherein one of us (A.M.Kapadia, J.) was party, the Division Bench of this Court has held that the petitioner has not impleaded the Industrial Tribunal as one of the respondents in the petition nor claimed any relief as such against the Industrial Tribunal. This conduct on the part of the writ petitioner in not impleading the Industrial Tribunal as one of the respondents in the petition and in not claiming any specific relief against the Tribunal would indicate that the writ petitioner has chosen to approach the High Court under Article-227 of the Constitution. Therefore, the documents produced by the writ petitioner alongwith the petition cannot be taken into consideration while

answering the question posed for consideration. Further, what is claimed is writ of certiorari and the writ of the certiorari means calling of record of subordinate authority and rendering decision by the High Court after considering the material placed before the authority. The documents which are sought to be relied upon by the writ petitioner in the petition does not form part of record of the Tribunal. Under the circumstances, writ of certiorari cannot be issued on the basis of documents sought to be produced and relied upon by the writ petitioner. In the present case also the appellant has not joined the Industrial Tribunal as one of the respondents in petition nor claimed any relief as such against the Industrial Tribunal. Moreover, even writ of certiorari has not been prayed for and hence there is no question of issuance of such writ in favour of the petitioner / appellant. The petition is, therefore, clearly considered to have been filed under Article-227 of the Constitution of India and appeal filed against the order passed therein is not maintainable in Clause-15 of the Letters Patent.

32. Once having held that the present Letters Patent Appeal is not maintainable under Clause-15 of the Letters Patent, as the learned Single Judge has passed the impugned judgment and order in exercise of his jurisdiction under Article-227 of the Constitution, it is not necessary for us to go into the merits of the matter. However, since the learned counsels appearing for the parties have addressed us on the merits of the matter, we have also undertaken the task of discussing the merit in brief and we are of the view that the learned Single Judge has passed a just and proper order and it is based on proper consideration and appreciation of the entire material and evidence on record and all the contentions of the parties were properly taken care of and hence the impugned order and judgment does not suffer from any error or infirmity either of facts or in law.

33. The facts clearly reveal that the appellant was offered employment on temporary basis, as temporary Security Inspector for six months, by

letter dated 26.11.1990 and then he joined as temporary Security Inspector on temporary basis of six months with effect from 1.1.1991. The said temporary period was extended for further period of six months by communication dated 28/29.5.1991. Subsequently the appellant was offered regular employment as Security Inspector, on probation basis, with effect from 1.1.1992. The said appointment was offered to the appellant by a letter dated 27.12.1991, as per which the probation period was of six months. The appellant's employment on probation basis was put to an end by the communication dated 13.4.1992 i.e. during the probation period and accordingly his probation based employment came to an end with effect from 13.4.1992. The record further reveals that the appellant approached the Labour Court by preferring an application under Section-78 read with Section-79 of the BIR Act. The Labour Court passed an ex-parte order dated 26.11.1992, which was subsequently set aside by an order dated 16.3.1994 and the application was restored to the file. The

pursis dated 16/17.3.1994 filed before the Labour Court clearly indicates that without prejudice to any of its contention, the respondent Company declared that it was ready to take appellant on the same post on which appellant was working and the appellant was also agreeable to report for work keeping his all contentions open. During the pendency of the said T Application No.248 of 1992, vacancy had arisen in the respondent company for the post of Section In-charge and, therefore, an inter-department advertisement for the purpose of selection and recruitment / appointment for the said post was issued by the respondent company on or about 9.5.1997. In response to the said inter-department advertisement the appellant made an application and pursuant to the said application, call letter was served on the appellant calling him for interview / selection process. The appellant was appointed as Section In-charge with effect from 1.7.1997. After the appellant's appointment as Section In-charge, the Labour Court decided the T Application on 28.11.1997 directing without setting aside the

termination and payment of backwages from the date of the appellant's termination i.e. 13.4.1992 to 16.2.1994. Appeal preferred against the said judgment and order of the Labour Court was dismissed and thereafter Review Application was filed. After considering all relevant aspects, Industrial Court allowed the said Review Application and set aside the judgment and order in Appeal as well as the order passed by the Labour Court in T Application. It is in this context, pursis filed before the Labour Court on 17.3.1994 assumes much significance as it was clearly stated therein that during the proceeding pending before the Labour Court and keeping all options open and without prejudice to any of the contentions, the respondent Company agreed to reinstate the appellant. The respondent Company is, therefore, well within its right to relieve the appellant vide its order dated 27.2.2003 after the aforesaid Review Application was decided by the Industrial Court.

34. It is also clearly revealed from the record that the

order dated 27.2.2003 was challenged by the appellant before this Court in Special Civil Application No.2819 of 2003. The said petition was disposed of by this Court on 26.3.2004. This Court considered the issue as to whether the respondent Company is a State within the meaning of Article-12 of the Constitution and even if the respondent Company were proved to be the State within the meaning of Article-12 of the Constitution, the appellant could not be said to be civil servant so as to attract Article-311 of the Constitution of India. The Court further considered the issue that in the earlier writ petition i.e. Special Civil Application No.2113 of 2003, the appellant has challenged the impugned order dated 27.2.2003 and his prayer for interim relief against implementation of the said order has been refused. The Court therefore took the view that the said petition i.e. Special Civil Application No.2819 of 2003 being duplication of proceeding, was not maintainable. The Court also took the view that the relief once refused cannot be claimed in the said petition. The Court further took

view that the petition involved disputed question of facts and hence the petition under Article-226 of the Constitution of India is not maintainable. The Court, however, clarified that the appellant shall be at liberty to challenge the said order dated 27.2.2003 before the Labour Court. The said order has become final.

35. In view of the aforesaid discussion, we are of the view that the communication dated 27.2.2003 cannot be challenged in the present proceeding, as it provides separate cause of action for which the appellant is having a statutory remedy. Even otherwise, the learned Single Judge has rightly observed while disposing of the said Special Civil Application No.2819 of 2003 that many disputed questions of facts are involved and hence the appellant should have approached the Labour Court for ventilating his grievance against communication dated 27.2.2003. As far as challenge against the order of Industrial Tribunal passed in Review Application is concerned, the Industrial Tribunal has

rightly intervened and set aside its earlier order in Appeal as well as order of Labour Court as the Labour Court has granted only backwages, without quashing and setting aside termination order. The said order of Labour Court was not challenged further by the appellant. The appellant did not have any declaration in his favour from any Court which entitles him to continue in service. There is no dispute about the fact that his services have been terminated while he was on probation and being a probationer, he did not acquire any vested right in his favour. Considering the legal submissions and the authorities referred to herein above, we are of the view that the order passed by the Industrial Tribunal in Review Application, which is confirmed by the learned Single Judge while disposing of the petition, does not require any interference by us.

36. In the above view of the matter, the present Appeal is liable to be dismissed on both grounds - on the ground of non-maintainability as well as on merits and it is accordingly dismissed without any order as

to costs.

37. Since Appeal is dismissed, Civil Application No.11144 of 2006, does not have any survival value and it is accordingly disposed off.

Sd/- Sd/-
(A.M. KAPADIA, J.) (K. A. PUJ, J.)